Office-Supreme Court, U.S.
FILED
JUN 12 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL W. GLUESENKAMP,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
Attorney General

RAYMOND L. MARKY
Assistant Attorney General
1502 The Capitol
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

THE INITIAL STOP AND SUBSEQUENT ARREST OF THE DRIVER OF PETITIONER'S TRUCK WAS NOT ARBITRARY OR UNREASONABLE FOR SAID ACTION WAS A LAWFUL EXERCISE OF THE POLICE POWERS OF THE STATE OF FLORIDA.

THERE IS NO CONFLICT BETWEEN THE DECISION SOUGHT TO BE REVIEWED AND DECISIONS RENDERED BY THIS COURT OR LOWER FEDERAL COURTS REGARDING THE SEARCH OF PETITIONER'S VEHICLE.

THE DECISION SOUGHT TO BE REVIEWED IS SUPPORTED BY THE EVIDENCE AND SECTION 570.15(2) AS CONSTRUED AND INTERPRETED BY THE FLORIDA SUPREME COURT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION OF THE COURT	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS WHY THE PETITION SHOULD BE DENIED	4
QUESTION I	4
QUESTION II	11
QUESTION III	12
CONCLUSION	21

Page

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) — 4,5,7

Arkansas v. Sanders, 442 U.S. 753 (1979) — 15,16,19

Berry v. State, 316 So.2d 72 (Fla.1st DCA 1975) — 14

Carrol v. United States, 267 U.S. 132 (1925) — 15

Chambers v. Maroney, 399 U.S. 42 (1970) — 15

Delaware v. Prouse, 440 U.S. 648 (1979) — 4,7

Dixon v. State, 343 So.2d 1345 (Fla.2d DCA 1977) — 15

Eden v. State, 370 So.2d 826 (Fla.1st DCA 1979) — 5,16

Evans v. State, 368 So.2d 58 (Fla.1st DCA 1979) — 16,17

Flyn v. State, 374 So.2d 1041 (Fla.1st DCA 1979) — 16

Hicks v. Miranda, 422 U.S. 332 (1975) — 6

Knoble v. State, ___ So.2d ___,(Fla.1st DCA 1981), Opinion filed May 28, 1981 — 19

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) — 7

Page

Rawlings v. Kentucky, 12
___ U.S. ___, 65 L.Ed.2d 633(1980)

Rose v. Locke, 17
423 U.S. 48 (1975)

Shelton v. State, 15
349 So.2d 193 (Fla.2d DCA 1977)

State v. Bailey, 8
120 Ariz. 399, 586 P.2d 648
(Ct.App.1978)

State v. Toffolia, 15
349 So.2d 174 (Fla.1st DCA 1977)

Stephenson v. Department of Agriculture and Consumer Services, 6,13
342 So.2d 60 (Fla.1976)

Texas v. White, 15
423 U.S. 65 (1975)

United States v. Chadwick, 15,19
433 U.S. 1 (1979)

United States v. Jiminez, 15
626 F.2d 39 (7th Cir.1980)

United States v. Mackey, 15
626 F.2d 684 (9th Cir.1980)

United States v. Martinez-Fuerte, 5,6,20
428 U.S. 543 (1976)

United States v. Schaffer, 7
461 F.2d 856 (9th Cir.1972)

STATUTES

	Page
28 U.S.C. §1257(3)	1,18
§320.01, Fla.Stat.	1,18
§570.15(1)(a), Fla.Stat.	13,17,18
§570.15(2), Fla.Stat.	5,6,11,12, 13

OPINION BELOW

The decision of the Supreme Court of Florida was rendered on October 16, 1980, and is reported in 391 So.2d 192 (Fla.1981). A petition for rehearing was filed and subsequently denied on January 14, 1981.

JURISDICTION OF THE COURT

Respondent concedes that jurisdiction is properly being sought pursuant to 28 U.S.C. §1257(3) and to the extent that a substantial federal question is presented, this Court can exercise its jurisdiction.

STATUTORY PROVISIONS INVOLVED

Statutes of the State of Florida relevant to a disposition of the instant petition, in addition to those designated by petitioner are:

> 320.01 Definitions, general.—In construing these statutes, when applied to motor vehicles, and when the context permits, the word, phrase, or term:
> (1) "Motor vehicle" includes:
>
> * * *

(b) Recreational vehicle-type units primarily designed as temporary living quarters for recreational, camping, or travel use, which either have their own motive power or are mounted on or drawn by another vehicle. As defined below, the basic entities are:

1. "Travel trailer": A vehicular portable unit, mounted on wheels, of such a size or weight as not to require special highway movement permits when drawn by a motorized vehicle. It is primarily designed and constructed to provide temporary living quarters for recreational, camping, or travel use. It is of a body width of no more than 8 feet and a body length of no more than 35 feet when factory-equipped for the road.

2. "Camping trailer": A vehicular portable unit mounted on wheels and constructed with collapsible partial sidewalls which fold for towing by another vehicle and unfold at the campsite to provide temporary living quarters for recreational, camping, or travel use.

3. "Truck camper": A portable unit, designed to be loaded onto, or affixed to, the bed or chassis of a truck, constructed to provide temporary living quarters for recreational, camping, or travel use. Truck campers are portable units designed to be affixed to a truck chassis and constructed to provide temporary living quarters for recreational, travel, or camping use.

4. "Motor home": A vehicular unit built on a self-propelled motor vehicle chassis, primarily designed to provide temporary living quarters for recreational, camping, or travel use.

5. "Fifth wheel recreation trailer": A vehicular portable unit mounted on wheels of such size or weight as not to require special highway movement permits. It is primarily designed and constructed to provide temporary living quarters for recreation, camping, or travel use and designed to be connected for towing through the use of a fifth wheel device. It is of a length and width not exceeding the limitations provided in s. 316.515, as the same may be hereafter amended.

* * *

(13) "Trucks" includes any motor vehicle designed or used principally for carrying things other than passengers and includes a motor vehicle to which has been added a cabinet box, platform, rack, or other equipment for the purpose of carrying merchandise other than the person or effects of the passengers.

STATEMENT OF THE CASE

Respondent, for purposes of this reply, accepts the statement of the case as stated on pages seven through twenty-seven of the petition as being substantially accurate. Respondent will include in the argument portion of its brief additional facts deemed relevant for a proper determination of the jurisdictional question.

REASONS WHY THE PETITION SHOULD BE DENIED

QUESTION I

THE INITIAL STOP AND SUBSEQUENT ARREST OF THE DRIVER OF PETITIONER'S TRUCK WAS NOT ARBITRARY OR UNREASONABLE FOR SAID ACTION WAS A LAWFUL EXERCISE OF THE POLICE POWERS OF THE STATE OF FLORIDA.

Petitioner, relying upon this Court's recent decisions rendered in *Delaware v. Prouse*, 440 U.S. 648 (1979) and *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), urges the stopping of the G.M.C. van being driven by Debra Cain was arbitrary and unreasonable and violative of *his* Fourth Amendment rights.

Petitioner has conveniently overlooked numerous facts relative to this case the most important of which was that the driver failed to stop at a *permanent* agricultural inspection station located on I-75 just south of the Georgia-Florida state line in

violation of Section 570.15(2) which makes it a misdemeanor of the second degree for *any* "truck" to fail to stop at said designated permanent inspection station. *Eden v. State*, 370 So.2d 826 (Fla.1st DCA 1979).

Pursuant to his statutory authority given by Section 570.151(2), Fla.Stat., Inspector Perry pursued petitioner's van. Upon stopping said vehicle and returning it to the inspection station, Perry placed *Cain* under arrest for violating 570.15(2).

Conspicuously absent from petitioner's brief is any reference to this Court's decision rendered in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) which distinguished *Almedia-Sanchez*, because the latter involved a roving patrol unit. In *Martinez* this Court made it abundantly clear that neither probable cause nor reasonable suspicion was required in order to conduct a stop and legitimate visual inspection of a

vehicle because such would be totally impractical to protect the government's legitimate interests. The Court rejected the argument advanced herein relative to the Fourth Amendment violations.

Also conspicuously absent from petitioner's brief is any reference made to the fact that in *Stephenson v. Department of Agriculture and Consumer Services*, 342 So.2d 60 (Fla.1976), this Court dismissed an appeal challenging the validity of the same statute ". . . for want of a substantial federal question. . . ." 434 U.S. 803 (1977). The State of Florida in *Stephenson* relied exclusively upon *Martinez* before this Court. Nothing has changed since that ruling and respondent submits there is still no substantial federal question regarding Sec. 570.15(2), Fla.Stat. Cf. *Hicks v. Miranda*, 422 U.S. 332 (1975).

Petitioner's reliance upon *Prouse* is likewise unavailing for in said case, which also involved roving-patrol units, this Court was careful to note in footnote 8b that:

> "Nor does our holding today cast doubt on the permissibility of roadside truck weigh-stations and inspection check-points, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others." 440 U.S. at 663

More importantly in *Prouse* this Court correctly observed that the methods employed by Delaware was not essential to protecting that State's admitted governmental interest. 440 U.S. at 659-661. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) has no application herein for this case does not involve a business establishment where time and circumstances are not critical. This Court recognized this distinction in *Almeida-Sanchez*, supra. See also: *United States v. Schaffer*,461 F.2d 856 (9th Cir.1972),

cert.denied, 409 U.S. 81 (1972) and *State v. Bailey*,120 Ariz. 399, 586 P.2d 648 (Ct. App. 1978).

Quite obviously if the state and federal government can require a particular type vehicle to stop at inspection stations, they may enact laws to enforce that governmental activity. Surely one cannot ignore the direction that they stop with impunity.

Counsel's statements that Inspector Perry used the statute as an investigatory tool rather than a regulatory one (Pet. at 29, 34) is totally unsupported by the evidence. No where in Perry's testimony on pages 31, 38-42 are there any statements which even remotely permit counsel to make such a claim. Not surprisingly, Perry admitted it was physically impossible to chase and arrest every truck operator that failed to stop at the inspection station and that the decision to do so was based upon a number of factors. As Mr. Perry stated:

> ". . . If I pursued every vehicle I would probably be out there right now. There is no way you could get every vehicle. . . ." (T 39)

Perry testified that in determining whether to attempt to stop a truck that does not voluntarily stop as required by the statute it depended on how busy he was at the time (T 38) and the visual observation of the vehicle. He said he attempts to stop ". . . the panel type vans, or the ones that you couldn't see through . . . [t]he ones that's got curtains around it and sitting down pretty low. . ." (T 39). These were the reasons given by Perry for chasing down petitioner's van when it failed to stop at the inspection station (T 46). Perry never asked for permission to *search* the vehicle he only asked to let him look inside to determine what he was hauling. (T 55). After returning to the inspection station and formally placing Debra Cain

under arrest, Inspector Perry called his supervisor (T 56) and awaited his arrival. He investigated nothing! Indeed, on cross-examination he testified his duties were to check agricultural products and not look for marijuana (T 64-65). Counsel's statement the statute in question is ". . . not regulatory but an excuse to allow law enforcement officers to investigate suspect vehicles. . ." (Pet. at 34) is pure nonsense. The inspection station is to conduct a limited inspection which is frequently granted by those who *do stop* which serves the public and legitimate governmental interest *or* to secure a warrant if appropriate and necessary where a visual inspection is denied. The fact that petitioner's vehicle did not stop and after the driver was arrested, others were called to determine what further actions should be taken does not establish the statute is not a regulatory statute.

The initial stopping of the van and arresting Debra Cain for violating Sec. 570.15(2) presents no substantial federal question.

QUESTION II

THERE IS NO CONFLICT BETWEEN THE DECISION SOUGHT TO BE REVIEWED AND DECISIONS RENDERED BY THIS COURT OR LOWER FEDERAL COURTS REGARDING THE SEARCH OF PETITIONER'S VEHICLE.

Petitioner is in error in stating that he was detained and the testimony of Inspector Perry clearly established that fact. Perry testified he arrested Debra Cain and detained the van (T 58) and he did not have anything to do with petitioner (T 60). The record shows the following:

> Q You had Ms. Cain. Your had Mr. Gluesenkamp, and you had a van. Were you to do anything with them until Garth got there?
>
> A I only had the driver and the van. I don't have much to do with the passengers. (T 60)

Of course he detained Ms. Cain and the van for she drove the vehicle past the station without stopping, but petitioner was never detained against his will, until *after* the seizure of the marijuana. The Florida Supreme Court so noted in its opinion. Since it is clear that the *petitioner* was not detained by the authorities, the argument that the delay violated his rights simply cannot be maintained. *Rawlings v. Kentucky*, ___ U.S. ___, 65 L.Ed.2d 633 (1980).

QUESTION III

THE DECISION SOUGHT TO BE REVIEWED IS SUPPORTED BY THE EVIDENCE AND SECTION 570.15(2) AS CONSTRUED AND INTERPRETED BY THE FLORIDA SUPREME COURT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The argument under this point is really a claim that Section 570.15 is unconstitutionally vague and denied petitioner equal protection of the law.

Respondent submits that this issue also fails to present a substantial federal question. It should be observed that the equal protection claim was presented to this Court in *Stephenson* and was rejected and this petitioner has presented nothing new for this Court to consider.

Section 570.15(2) requires all *trucks* to stop. Recreational vehicles are not "trucks" and are not required to stop. This case does not deal with the access provisions of Sec. 570.15(1)(a).

The officers never entered the vehicle until after probable cause was established and petitioner has not and does not question the existence of probable cause after the officers smelled the odor of marijuana eminating from the cargo door and observing the portion of burlap bag seen through the window of the van and the curtain. Petitioner, who stated he installed "*plants* in

stores and restaurants" which is what his van was used for, testified the curtain was tied to block the view into the back of the van (T 85). The witnesses for the state testified they did see the burlap because there was a crack in the curtain (T 5,7,71).

The trial judge in this case in denying the motion to suppress found:

> ". . . I find that probable cause is there for them to make a warrantless search, and I might add to this that it is satisfactory to me that they did view the sacks of marijuana in there and smell it. There was some question as to the difference of testimony. I rule that that is what I believe from the facts, and that these sacks, from the description of them, that we've had so many cases come through here of similar things, and the testimony has always been that they've been the same type. So eventhough they didn't see the marijuana material itself, their observation together with the smell is sufficient, and [I] overrule the motion. . . ." (T 100-101)

That finding of probable cause is clearly correct. *Berry v. State*, 316 So.2d 72 (Fla.

1st DCA 1975); *State v. Toffolia*, 349 So.2d 174 (Fla.1st DCA 1977); *Dixon v. State*, 343 So.2d 1345 (Fla.2d DCA 1977) and *Shelton v. State*, 349 So.2d 193 (Fla.2d DCA 1977).

Given the existence of probable cause, petitioner's van could be *searched* without a warrant and without regard to exigent circumstances and the Florida Supreme Court properly so held. *Carrol v. United States*, 267 U.S. 132 (1925); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Texas v. White*, 423 U.S. 65 (1975).

Petitioner's reliance upon this Court's decisions in *United States v. Chadwick*, 433 U.S. 1 (1979) and *Arkansas v. Sanders*, 442 U.S. 753 (1979) is totally without merit. Garbage bags and burlap bags are not protected by *Chadwick* and *Sanders*. *United States v. Mackey*, 626 F.2d 684 (9th Cir. 1980); *United States v. Jiminez*, 626 F.2d

39 (7th Cir.1980); *Flyn v. State*, 374 So. 2d 1041 (Fla.1st DCA 1979); *Evans v. State*, 368 So.2d 58 (Fla.1st DCA 1979) and *Arkansas v. Sanders*, supra, 442 U.S. at 764, n. 13.

Petitioner's vagueness claim based upon the notion that a van is not a "truck" is absurd. A "van" is nothing more than a fancy label attached by manufactures, distributors and advertisers to what everyone of common understanding knows is a panel-type truck. It should come as no surprise that the Florida courts have held that a "van" is a "truck", *Eden v. State*, 370 So. 2d 826 (Fla.1st DCA 1979) unless it is designed or used principally for carrying passengers and their effects--a bus either large or small or a recreational vehicle.

Petitioner's contention that the statute failed to provide adequate notice is legally

untenable for in 1977 the statutes of Florida authoritatively defined that term and the judicial interpretation in both *Evans* and the instant case was clearly forseeable. *Rose v. Locke*, 423 U.S. 48 (1975).

Interestingly, petitioner never contended his van was not a truck for the evidence and its use demonstrated the contrary.

Respondent respectfully submits the statute defining a "truck" as well as common sense would inform anyone of reasonable intelligence that a van such as involved in this case was a truck. In short, a rose by any other name smells the same.

Petitioner's claim that the "access" provision of Sec. 570.15(1)(a)7 to vehicles "other than private passenger automobiles with no trailer in tow or any vehicle bearing an RV license tag" creates an arbitrary and

unreasonable classification is superficially appealing but legally erroneous.

Section 570.15(1)(a) pertains to the department's *general* right of access to certain *places* and things and is not limited to the road-guard inspection stations. Subsection (2) is what commands vehicles to stop at a road-guard inspection station for inspection and it only requires a "truck" or "motor vehicle trailer" to stop.

Recreational vehicles in Florida are defined as units designed as temporary living quarters for recreational, camping or travel use and defined as a "travel trailer", "camping trailer", "truck camper", "motor home" or "fifth wheel recreation trailer." Section 320.01(1)(b)1.-5., Fla. Stat. These vehicles are not "trucks" as defined by Section 320.01(13) and are *not* required to stop whether they are Florida vehicles bearing a RV license plate or

out-of-state vehicles. Out-of-state recreational vehicles are not required to stop and their operators may not be arrested for failing to do so. *Knoble v. State,* ___ So. 2d ___ (Fla.1st DCA 1981), Opinion filed May 28, 1981. Neither do in-state recreational vehicles stop.

Of course, the reason the Florida Legislature has seen fit to exempt automobiles and recreational vehicles from stopping and being inspected, even though smugglers do in fact successfully transport marijuana and other controlled substances in those kinds if vehicles is very understandable as well as rational. First, the owners and operators of recreational vehicles, because they are "temporary living quarters", have a greater expectation of privacy in them. *United States v. Chadwick* and *Arkansas v. Sanders,* supra. Secondly, because of their character the brief visual

inspection which is all that could legally be authorized would not serve any useful purpose. The authorities would have to conduct a search of the various compartments and that simply would be beyond the police powers of the State of Florida. *United States v. Martinez-Fuerte*, supra, at 567.

The Florida Supreme Court's conclusion that the distinction between vehicles designed, maintained, or used for the carriage of property on the one hand and vehicles designed to carry people and effects of its passengers is reasonably related to the Department of Agriculture's legitimate inspection function and does not violate the equal protection clause is sound indeed.

CONCLUSION

Petitioner has totally failed to show the existence of a substantial federal question which merits the exercise of this Court's discretionary consideration. Accordingly, the petition should be denied.

Respectfully submitted,

JIM SMITH
Attorney General

RAYMOND L. MARKY
Assistant Attorney General
1502 The Capitol
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR RESPONDENT